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In the Supreme Court of the United States

OCTOBER TERM, 1958

THE SENECA NATION OF INDIANS, PETITIONER,

v.

WILBER M. BRUCKER, *Secretary of the Army*, and EMERSON C. TESCHNER, *Major General, United States Army Corps of Engineers*, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Seneca Nation of Indians, the above-named petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The memorandum opinion of the District Court (Appendix A *infra* pp. 15-17) is not officially reported. The opinion of the Court of Appeals (Appendix B *infra* pp. 18-20) is reported at 262 F. 2d 27.

JURISDICTION

The judgment of the Court of Appeals was entered on November 25, 1958 (Appendix C *infra* p. 21). By order of the Chief Justice, dated January 28, 1959, the time for filing a petition for a writ of certiorari was extended to and including April 23, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1[illegible](1).

QUESTION PRESENTED

Whether, despite its treaty obligation never to claim nor disturb the Seneca Nation in the free use and enjoyment of its lands, the United States may be held to have authorized *by implication*, the expropriation of virtually the whole of the Allegany (Seneca) Indian Reservation by virtue of an *appropriation* of lump sums for flood control without mention or reference to the lands, the Indians, or the treaty on the face of such legislation.

TREATY AND STATUTES INVOLVED

The Pickering Treaty of 1794 (7 Stat. 44) provides in Article III:

> Now, the United States acknowledge all the land within the aforesaid mentioned boundaries, to be the property of the Seneka Nation; and the United States will never claim the same, nor disturb the Seneka in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

The Public Works Appropriation Act, 1958 (Public Law 85-167, 85th Cong., August 26, 1957, 71 Stat. 416) provides in pertinent part under Title I—CIVIL FUNCTIONS, DEPARTMENT OF THE ARMY—as follows:

> **Rivers And Harbors And Flood Control**
>
> • • •
>
> The following appropriations shall be expended under the direction of the Secretary of the Army and the supervision of the Chief of Engineers for authorized civil functions of the Department of the Army pertaining to rivers and harbors, flood control, beach erosion, and related purposes:
>
> **General Investigations**
>
> For expenses necessary for the collection and study of basic information pertaining to river and harbor, flood control, shore protection, and related projects, and when authorized by law, preliminary examinations, surveys and studies *** of projects prior to authorization for construction, to remain available until expended, $10,779,600.

Construction, General

For the prosecution of river and harbor, flood control, shore protection, and related projects authorized by law; detailed studies, and plans and specifications, of projects *** authorized or made eligible for selection by law (but such studies shall not constitute a commitment of the Government to construction); *** to remain available until expended, $449,398,500 ***

STATEMENT

The lands here involved are those confirmed to the Seneca Nation by the Pickering Treaty of 1794 (7 Stat. 44). The facts thereof are stated below in the Reasons for Granting the Writ.

The Act of August 18, 1941, for the first time authorizes the inclusion of an "Allegheny Reservoir project" within the previously approved Ohio River Basin flood control program "in accordance with the recommendation of the Chief of Engineers in House Document Numbered 300, 76th Congress, 1st Session" (55 Stat. 638, 646). The latter document, to which statutory reference is thus made, outlines the dam and reservoir under consideration from an engineering and flood control standpoint but, after reviewing the history of the Allegany Indian Reservation (pp. 39-42), concedes that (p. 42):

> The extinguishment of the Indian right of occupancy to the Allegany Reservation will probably necessitate that an agreement be entered into with the Seneca Nation under the supervision of the Office of Indian Affairs and that by appropriate legislation Congress authorize or approve such agreement. Attention is invited to the excerpt from the Treaty of 1794 above set forth. In view thereof it is extremely doubtful that Congress would authorize the acquisition of the affected area of the Allegany Indian Reservation until a voluntary agreement had been reached with the Seneca Nation. It is obvious that any agreement entered into by the Seneca Nation would of necessity contain provisions making it incumbent upon the United States to provide additional lands in New York State for said nation to replace those taken.

Congress took no action then, nor for the succeeding seventeen years, which of course included the period of World War II.

In the spring of 1957 hearings were held by the Subcommittee on Public Works of the House Appropriations Committee, at which the Seneca representatives were heard on the proposal to allow $1,000,000 (out of some $100,000,000 estimated cost) for the project (Hearings, *Public Works Appropriations for 1958*, Part I, pp. 451-479). Chairman Clarence Cannon, who headed then (as now) both the full committee and the subcommittee, engaged in the following colloquy with Seneca counsel (id., p. 472):

> MR. CANNON: This land having been conveyed by a solemn treaty, would come in a different category from that which the average American citizen might own, and would it not to that extent be exempt from condemnation?
>
> MR. O'NEILL: Definitely sir. *** But it is not exempt from Federal condemnation if Congress sees fit to abrogate the treaty, which is the right of Congress.
>
> MR. CANNON: But, it would have to be by a solemn act of Congress, would it not, and passed by both houses and signed by the President?

The $1,000,000 nevertheless stayed in the appropriation with the parenthetical statement, as to all projects under the heading "Construction, General," that "such studies shall not constitute a commitment of the Government to construction" (71 Stat. 416). This statute contains no mention of the Allegheny Reservoir Project—much less any mention of the Seneca Nation, specification of their lands to be affected, or consideration of the abrogation of the Pickering Treaty guarantee heretofore quoted. Only in the committee reports is the project mentioned, and a million dollars allocated to it.

In the House of Representatives the committee report (No. 552, 85th Congress) just lists "Allegheny River Reser-

voir, Pa. and N.Y." along with 278 other public works projects in 45 states and two territories for the sum of "1,000,000" in a column headed "Construction" (p. 7). The Senate Report (No. 609) does the same, but with the addition of the following statement (p. 26):

> **Allegheny River Reservoir, Pa.**
>
> The committee has approved the budget estimate of $1 million to initiate con truction of this project. The Corps of Engineers has indicated a willingness to accept flowage easements over land owned by the Seneca Indians, in order that the reservation may be kept intact. The committee desires that the Corps of Engineers cooperate to the maximum extent practicable with the Seneca Indians, in order to minimize the effect of the Allegheny River Reservoir on the Indian lands. It is recognized that if the Seneca Indian Nation elects to grant easements for this purpose, they will control the reservoir area within the boundaries of their reservation, and that recreational benefits will inure to the Seneca Nation as a result of the development of this project. The committee recognizes that this procedure may not be entirely satisfactory to all the Seneca Indians, but also realizes that they have rights in the courts if they insist on determining the issues involved in the courts.

The same legislation was passed again the following year in the same form (Public Law 85-863, 85th Cong., September 2, 1958). The sum allocated to the Allegheny River Reservoir in the tabulations in the committee reports was again $1,000,000, but the committees of each House provided that "none of the funds for the Allegheny River Reservoir project are to be obligated pending decisions" in this litigation (House Rep. No. 1864, 85th Cong., p. 10; Senate Rep. No. 1796, 85th Cong., p. 21) and the conference committee adopted the same position (House Rep. No. 2670, p. 20).

The Seneca Nation promptly filed its bill for an injunction on August 30, 1957 (R. 1), just days after the passage of the 1957 Act described above. Had it not done so, under the decisions of this Court it would have lost its right to do

anything more than procure compensation. *New York City* v. *Pine*, 185 U.S. 93, 98. The Seneca sought to contest the implied abrogation of their treaty, not mere compensation. *Hurley* v. *Kincaid*, 285 U.S. 95, 103. They alleged in their action that the constructed dam would cause irreparable injury "in that the value of said land will be destroyed and that the use and occupation of the same will be forever lost to your petitioner" (R. 1, 4) in violation of law (R. 3-4). See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 582. Although it denied the Government's motion to dismiss (R. 6), after hearing the trial court dismissed the action upon finding that Congress passed both statutes "with full knowledge" of the Seneca treaty and tribal opposition to the flooding of their lands (R. 55, 57). The Court of Appeals took the same position (Appendix B, *infra*, pp. 18-20) holding that the Congressional documents "show Congress knew" that the Seneca lands would be flooded.

REASONS FOR GRANTING THE WRIT

The issue here is not whether Congress could not, by appropriate action, abrogate the Seneca treaty in whole or part and take over the tribal lands through a due exercise of the power of eminent domain. *Cherokee Nation* v. *United States*, 135 U.S. 641. The point is that it did not do so. (1) There has been, if the judgment below is affirmed, a cutting of the heart of the small reservation remaining to the Seneca Nation. (2) It is at least doubtful that Congress intended a specific and irrevocable exercise of the legislative power of eminent domain in this case. (3) Even if it be deemed that there was some such intent, it does not appear, as this Court has held to be requisite, "from the words used in the statute" so explicit as to leave no room for doubt. (4) And, if nevertheless the authority found by the courts below is allowed to stand, not only will the custom and practice of more than a century be suddenly outmoded but tribal lands and rights will become subject to legislation of every description, which carries no hint on its face

that it overrides vested Indian rights or solemn tribal treaties.

1. The Seneca Reservation is a thirty-mile stretch of the narrow valley of the Allegheny River in western New York extending to the Pennsylvania line and varying in width from less than a mile to two miles (R. 20 and Plaintiff's Exhibit 13). To date some 30,000 acres remain, technically, Seneca lands (R. 55). Over 6000 acres are occupied by villages leased to non-Indians pursuant to Acts of Congress for the benefit of non-Indians (R. 26-27; and see *United States* v. *Forness*, 125 F. 2d 928 (1942), cert. denied). About 12,000 acres are inaccessible and uninhabitable hillsides (R. 15-19). More than 600 acres are taken by railway and highway easements, the river channel, and swamp (R. 30). The proposed dam will flood the valley save for its more precipitous and uninhabitable portions, including 9000 acres of habitable Seneca land (R. 10). This will leave only 2300 acres suitable for the regular use of the Seneca Indians. The Government's answer admits "that the area in the reservation which will be flooded both permanently and temporarily is approximately 9,014 acres" (R. 10). The trial court found that, when built, the dam "in times of high flows in the Allegheny River . . . will flood a substantial part of the reservation" (R. 56).

These facts demonstrate the lack of reality of the statements in the Senate Committee Report in 1957 (No. 609, 85th Cong., p. 26) promising not only "to minimize the effect of the Allegheny River Reservoir on the Indian lands" but to so proceed "that the reservation may be kept intact" (quoted in full in the Statement above). While the phrase "flowage easements" there used may be technically correct, it certainly did not apprize the Senate of the seriousness and magnitude of the matter. No other representation was made on the face of the bills, nor in the committee reports, that the project, if authorized, would thus flood Indian lands and in effect abrogate treaty rights.

2. The only statute claimed to authorize the expropriation here involved is an act appropriating money. The method of procedure for public work appropriations is not only of long standing, but specifies very little on the face of the legislation. *South Carolina* v. *Georgia*, 93 U.S. 4, 13-14. Thus the adoption of "projects" as the Act of 1941 did here (55 Stat. 638, 646, quoted in the Statement above) has been described by this Court in *United States* v. *Sponenbarger*, 308 U.S. 256, 268, as follows:

> In general language it adopted a program recommended by the Chief of Army Engineers, but Congress did not sweep into the statute every suggestion contained in that recommendation.
>
> Since it envisaged a vast program, the Act naturally left much to the discretion of its administrators and future decisions of Congress. Recognizing the value of experience in flood control, Congress and the sponsors of the Act did not intend it to foreclose the possibility of changing the program's details as trial and error might demand.

In other words, if the shoe were on the other foot in the sense that petitioner were now asking compensation for a taking, it would be held for these reasons that there has been no taking pursuant to the power of eminent domain. *Danforth* v. *United States*, 308 U.S. 271, 283-284. In this form of legislation there is not even the identification of lands normally held to be the requisite, even apart from the special situation of Indian tribes and treaty guarantees, to the exercise of the power of eminent domain. *Kohl* v. *United States*, 91 U.S. 367, 374; *Old Dominion Land Co.* v. *United States*, 269 U.S. 55, 64. It permits the sovereign to test the situation and, if it discovers determined resistance, "to abandon the proposed undertaking and seek its water supplies in some other direction". *New York* v. *Pine*, 185 U.S. 93, 98.

In the light of this practice, the legislative history here relied upon by the courts below as showing knowledge and

intent, actually falls into place with quite different effect. Congress knows, of course, that price is often the main concern of protestants, not their right to keep the property regardless of price. *Hurley* v. *Kincaid*, 285 U.S. 95, 103. This is why the chairman of the House committee stated at the hearings, when the Seneca appeared to protest the construction of the dam, that the ultimate action, in view of the treaty, "would have to be by solemn act of Congress" (Hearings, *Public Works Appropriations for 1958*, quoted above in the Statement, p. 472). It explains the statement of the chairman of the Senate subcommittee, in charge of the bill on the floor there, to the effect that "nothing can be done by the engineers until a settlement is agreed upon, either amicably or through the courts" (103 Cong. Rec. 12713, daily issue, August 8, 1957). It also explains why the very Act of 1957 alleged to abrogate the treaty here goes on to provide, as to other Indians in connection with another dam in the far West, for the payment of members of named tribes whose

> rights and interests will be impaired by the Government incident to the construction, operation, or maintenance of The Dalles Dam . . . and must be subordinated thereto by agreement or litigation . . .

This appears at 71 Stat. 416 following immediately upon the quoted portion set forth above in Statutes Involved. For them, unlike the Seneca, Congress deliberately exercised the power of eminent domain as to Indian rights.

It is to be noted, further, that through all these legislative documents runs a confusion of thought as to the issue, it being apparent that many of the speakers had in mind litigation as to the *power* of Congress ever in any manner and by any form of action to override the Seneca treaty. That has never been the issue here. This Court has often adverted to lack of authoritative guides to interpretation in such situations. Compare *United States* v. *McKesson & Robbins*, 351 U.S. 305, 313-315.

Further demonstrating what happened is the fact that reference to the Seneca problem was subordinated throughout to the issue as to the wisdom of the particular project here involved on its own merits. An alternate plan had been broached in the House hearings (*Public Works Appropriations for 1958, supra*, 465-468). It was spread upon the record during the Senate debate (Cong. Rec., *supra*, p. 12714-15). Seneca rights were dragged into the House debates merely as a make-weight for the opposition to the Allegheny Reservoir (103 Cong. Rec. 8680, 8682-3, 8689, 8690-93, 8707-9, 8710-15, daily issue, June 19, 1957). Time for filing this petition was deferred in this Court because the Corps of Engineers were reconsidering the plan and, if judicial notice may be taken of the fact, it will be seen that hearings are still continuing in the House on the subject.

3. Was there such a legislative facing up to the issue—of the positive abrogation of the Seneca treaty—by Congress here as to amount to an ascertainable intention to that effect despite its failure to so declare on the face of the legislative enactment? The treaty here involved is one expressly recognized and preserved by the laws (25 U.S.C. 71 and 177). The modification or effect of treaties generally, to say nothing of Indian treaties, is a matter of special concern. "The purpose by statute to abrogate a treaty or any designated part of a treaty . . . must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute . . ." *United States* v. *Lee Yen Tai*, 185 U.S. 213, 331. No such purpose here appears "from the words used in the statute" upon which the Government and the courts below relied.

This case, moreover, involves a valid and subsisting Indian treaty of long standing. Treaties, of course, have the effect of statutes and the one may repeal the other. But this Court has said that, when Indian treaty or "trust" lands are alleged to be affected by later legislation, "it must

not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore, to displace the prior statute." *Frost* v. *Wenie*, 157 U.S. 46, 58. Here, surely, the statute on which the Government relies is not "so clear and explicit in its words" as to warrant the assumption that it repeals by implication the Pickering Treaty guarantee to the Seneca Nation. Furthermore, apart from the form of words used, this Court has frequently announced its special concern for the protection of the Indian tribes and their treaty rights. *Squire* v. *Capoeman*, 351 U.S. 1, 6-71; and see also *United States* v. *Payne*, 264 U.S. 446, 448. If the treaty protection here involved may be held to be impliedly repealed not by any words of the statute, but by mere "legislative history", then surely not only the special position of treaties but the often announced concern for tribal parties to such instruments can mean very little.

4. Here Congress made no express legislative declaration that it was taking the Seneca lands notwithstanding the treaty engagement to the contrary. That the subject was given some attention in the committee hearings and floor debates is true. But even there the tribal rights were bandied about in the colloquy of partisans solely as an incident in the interplay of larger political and material forces. If the latter may be taken as circumstantial evidence of a legislative intent to perform the solemn act of abrogating a treaty in material part, by no more than the passage of an appropriation act which makes no reference to the subject, then *a fortiori* the doors are open to the same application of all manner of legislation merely because the subject of Indian treaties or other rights is mentioned in the legislative history.

Indeed, such a rule would make it hazardous for Indian

tribes to appear and be heard in opposition to legislation, for the mere recording of such appearance would be evidence, as the courts below held, that "Congress knew" and hence "intended" any legislation adopted to override Indian rights and objections. Moreover, and of even more importance, it will no longer be necessary to notify the whole membership of the Houses of Congress of the pending proposals by spreading them upon the face of proposed legislation, for the result may be achieved merely by recording in some Congressional document a recognition that the application of such legislation might affect Indian rights. The practice of a century or more of legislation, recognizing the need for specificity in statutes for such purposes, will be brought to an end. See the extended discussion and listing in Appendix D *infra*. Much of Title 25 of the United States Code will be rendered unnecessary or inoperative, such as the special provisions for rights of way over Indian lands (sections 311 *et seq.*) and the requirement of tribal consents (*id.* 324).

The status of tribal property will be most precarious under any such state of the law. As shown above, the form of legislation here involved is not itself a taking of land, but the courts below have held that it may be made the basis for a subsequent executive expropriation of tribal lands. Appropriation acts in these circumstances will confer inchoate authority and become operative "merely because some officer thereafter takes possession . . . with a view to effectuating the general purpose of Congress". *United States* v. *North American Transp. & Trading Co.*, 253 U.S. 330, 333. That this result is an abrupt break with tradition and the customary course of legislation is vividly portrayed in the opinion of the District Court of the United States for South Dakota in *United States* v. *2,005.32 Acres of Land*, 160 F. Supp. 193 (1958) which, because of its full discussion and citations, is reproduced in full as Appendix D hereto *infra* pp. 22-35.

CONCLUSION

We believe it plain that the judgment below conflicts with the long settled course of judicial and legislative practice, and with the decisions of this Court. It has erected a new basis for the executive exercise of the sovereign power of eminent domain, to the disadvantage of treaty parties and Indian tribes, which should not be permitted to become the law of the land except upon full consideration by this honorable Court.

Respectfully submitted,

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APRIL 23, 1959.

APPENDICES

APPENDIX A

[Caption omitted]

MEMORANDUM OPINION

This is an action to enjoin the Secretary of the Army and the Chief of the United States Army Corps of Engineers from commencing the construction of a flood control dam intended, primarily, for the protection of Pittsburgh, in the Allegheny River in the vicinity of Kinzua, Pennsylvania, the project being officially designated as "the Allegheny Reservoir Project" which is approximately twelve and one-half miles downstream from the Pennsylvania-New York border.

Within the area of the project is part of a reservation which was the subject of a treaty between the Seneca Nation, as a member of the Iroquois Confederacy, and the Government of the United States, executed on November 11, 1794, and commonly known as the "Pickering Treaty" by which the United States covenanted and acknowledged ". . . all the land within the aforementioned boundaries, to be the property of the Seneka Nation; and the United States will never claim the same, nor disturb the Seneka Nation, nor any of the Six Nations, of of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same to the people of the United States, who has the right to purchase."

The plaintiff contends, and the defendants concede, that treaties with Indians are to be construed more favorably to the Indians and according to the way the Indians understood them when they were made as far as the language in the treaties will fairly permit.

On the other hand, the defendants contend, and the plaintiff concedes, that the power of eminent domain of the United States can be exercised over Indian tribal lands regardless of treaty provisions. *Cherokee Nation* vs. *Southern Kansas Railway Company*, 135 U.S. 641; *Lone Wolf* vs. *Hitchcock*, 187 U.S. 553.

To summarize the plaintiff's contention, it concludes its brief in the following language:

> "The Seneca Nation does not claim that Congress is without authority to abrogate a treaty outstanding with

the United States Government—whether it be a treaty consummated one hundred and sixty-three years ago to secure peace and the well being of this country, or whether it be one consummated within the past five or ten years to likewise secure peace and well being. The Seneca Nation does claim that the rights convenanted under such a treaty—especially one with an Indian tribe—cannot be destroyed by implication, innuendo, or unauthorized acts of the Executive. To destroy such rights Congress must specifically so say. This it has failed to do in the instant case."

The plaintiff contends that general acts of Congress do not affect Indian Treaty rights and further, that they do not nullify previous special acts whether in the form of legislative enactments or treaties. Many court decisions are cited by the plaintiff in support of these contentions but a review of the authorities indicates that the test is not whether the Congress has acted by general legislation or special acts, but whether, whatever the form of the legislation, Congress has manifested an intention to include Indian treaty rights in the legislation.

As was pointed out in *Elk* vs. *Wilkins*, 112 U.S. 94, 100, "General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."

The Court is of the opinion that general legislation is sufficient to override the provisions of an Indian treaty where the intent of Congress to do so is clear. *United States* vs. *Forty-three Gallons of Whiskey*, 108 U.S. 491, 496; *Choteau* vs. *Burnet*, 283 U.S. 691; *Superintendent* vs. *Commissioner*, 295 U.S. 418; *Henkel* vs. *United States*, 237 U.S. 43.

The ruling of the Supreme Court in *Spalding* vs. *Chandler*, 160 U.S. 394, 406, in the opinion of the Court, is dispositive of the plaintiff's contentions in this case.

Having concluded that Congress may by general legislation authorize the acts which are the subject of the plaintiff's complaint, the Court is of the opinion that a review of the legislative history leading to and including the Appropriation Act of August 26, 1957 which appropriated and earmarked One Million Dollars for the construction of the Allegheny Reservoir Project manifested a clear Con-

gressional intention to authorize the construction of the project. *United States* vs. *Great Falls Mfg. Co.*, 112 U.S. 645; *United States* vs. *Threlkeld*, 72 F. 2nd 464; *Ryan* vs. *Chicago B & Q.R. Co.*, 59 F. 2d 137.

Since it is the view of the Court that the project is authorized by the appropriation, the plaintiff's application for injunction must be denied, *Bragg* vs. *Weaver*, 251 U.S. 57; *Crozier* vs. *Krupp*, 224 U.S. 290, and the plaintiff must seek relief by its remedies at law. In this connection, there is no contention that the defendants intend to flood any of the plaintiff's lands without first acquiring the right to do so by purchase or condemnation. In fact, there is a proceeding in the United States District Court for the Western District of New York in *United States* vs. *21,250 Acres of Land, Etc.*, C.A. No. 7279, in which that Court rejected the same claims of the plaintiff as have been advanced here when the plaintiff moved to vacate and set aside an order for delivery of possession, which motion was denied.

The petition for injunction will be dismissed and counsel for defendants will submit proposed Findings of Fact, Conclusions of Law, and Judgment.

(s) JOSEPH C. MCGARRAGHY
Judge

MARCH 24, 1958

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

No. 14488

THE SENECA NATION OF INDIANS, APPELLANT

v.

WILBER M. BRUCKER, SECRETARY OF THE ARMY, AND EMERSON C. ITSCHNER, MAJOR GENERAL, UNITED STATES ARMY CORPS OF ENGINEERS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Decided November 25, 1958

Before EDGERTON, WILBUR K. MILLER, and BASTIAN, *Circuit Judges.*

Mr. Edward E O'Neill, with whom Mr. C. Walter Harris was on the brief, for appellant. Mr. Roger P. Marquis, Attorney, Department of Justice, for appellees.

PER CURIAM: The appellant Seneca Nation of Indians seeks an injunction to restrain the appellees from constructing an Allegheny Reservoir Project so as to flood a substantial amount of appellant's lands. The District Court dismissed the complaint.

It is undisputed (1) that the proposed flooding will infringe Indian rights acquired by treaty in 1794, and (2) that Congress can authorize a taking by eminent domain despite the treaty. *Cherokee Nation* v. *Southern Kansas Railway Company*, 135 U.S. 641, 654-657 (1890). The question here is whether Congress has, in a sufficiently clear and specific way, shown an intention to do so.

An Act of Congress of August 18, 1941 appropriated $45,000,000 "for the prosecution of the comprehensive plan approved in the Act of June 28, 1938, for the Ohio River Basin, modified to include the Allegheny Reservoir project in accordance with the recommendation of the Chief of Engineers in House Document Numbered 300, Seventy-sixth Congress, first session." 55 Stat. 638, 646. In that

Document the Chief of Engineers plainly showed that the project he recommended would flood the lands in suit in violation of the treaty of 1794. In January 1957 the United States District Court for the Western District of New York in condemnation proceedings authorized a survey of the lands in question, "based upon the verified assertion of the Secretary of War that a survey of such lands and others would be necessary for the construction of the Kinzua dam." *United States* v. *21,250 Acre of Land, . . . The Seneca Nations of Indians, A Body Corporate, et al.*, [61 F. Supp. 376, 377.

In August 1957 Congress appropriated funds "For the prosecution of river and harbor, flood control, shore protection, and related projects authorized by law . . . ." 71 Stat. 416, 417. The hearings, congressional debate and Senate report on this appropriations bill show that the Allegheny River Reservoir was one of the projects covered. They also show Congress knew (1) that the Seneca lands would be flooded, (2) that the Seneca Nation was unwilling to relinquish any of its rights in the lands, and (3) that the lands could be taken by eminent domain. *Hearings*, House Subcommittee on Appropriations, *85th Cong.*, 1st Sess., on Public Works Appropriations for 1958, [Government Justification,] part 2, pp. 111-128; *Hearings*, House Subcommittee on Appropriations, 85th Cong., 1st Sess., on Public Works Appropriations for 1958, Private Testimony, part 1, pp. 451-479, 497-498, 1030-1033, 1050-1052; *Hearings*, Senate Subcommittee on Appropriations on H.R. 8090, Civil Functions, Department of the Army, pp. 785-791, 1290-1293, 1379-1388, 2285-2291, 2457-2462; 103 Cong. Rec., 85th Cong., 1st Sess., part 7, pp. 9674-9675, 9683-9684, 9702-9709; 103 Cong. Rec., 85th Cong., 1st Sess., part 10, pp. 13977-13981; S. Rep. No. 609, 85th Cong., 1st Sess., p. 26. Both of the Senators from New York, Senator Ives and Senator Javits, after expressing concern over the taking of Indian lands, voted for the bill. Senator Ives said:

> What has disturbed me, as my friend from Louisiana and some other members of the Committee on Appropriations know, is that by this action we will be virtually wiping out the Allegheny Reservation of the Seneca Nation of the Iroquois Confederacy in New York State . . . I realize that under the procedure followed by the

> Government of the United States over the years in the handling of matters concerning Indian reservations, the Government has the legal right to do what is proposed. But what distresses me is the moral responsibility we have. 103 CONG. REC., 85th Cong., 1st Sess., part 10, p. 13977.

We think Congress has authorized the taking of these lands.

Affirmed.

APPENDIX C

United States Court of Appeals for the District of Columbia Circuit

No. 14488

THE SENECA NATION OF INDIANS, APPELLANT

v.

WILBER M. BRUCKER, SECRETARY OF THE ARMY, AND EMERSON C. ITSCHNER, MAJOR GENERAL, UNITED STATES ARMY CORPS OF ENGINEERS, APPELLEES.

September Term, 1958.

C. A. 2202-57

United States Court of Appeals
For the
District of Columbia Circuit

Filed Nov. 25, 1958

JOSEPH W. STEWART, *Clerk*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Before: EDGERTON, WILBUR K. MILLER and BASTIAN, *Circuit Judges.*

JUDGEMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

PER CURIAM.

Dated: Nov. 25, 1958

APPENDIX D

In the United States District Court for the District of South Dakota

Northern Division

Civil No. 722 N.D.

Tract R-1825

UNITED STATES OF AMERICA, PLAINTIFF

v.

2005.32 ACRES OF LAND, MORE OR LESS, SITUATE IN CORSON COUNTY, SOUTH DAKOTA; AND SIOUX INDIANS OF STANDING ROCK RESERVATION, ET AL., AND UNKNOWN OWNERS, DEFENDANTS

MEMORANDUM DECISION

Hon. Clinton G. Richards, United States Attorney, and Messrs. H. R. Jackson and Robert L. Jones, Assistant United States Attorneys, of Sioux Falls, South Dakota, appeared in behalf of the plaintiff; and Mr. Marvin J. Sonosky, of Washington, D. C., appeared in behalf of the Standing Rock Sioux Tribe.

As a part of the land acquisition program for the Oahe Dam and Reservoir project, the United States of America by the Secretary of the Army has commenced condemnation proceedings against 6.45 acres of Indian tribal land, designated as Tract R-1825, belonging to the Standing Rock Sioux Indian Tribe and located on the Standing Rock Indian Reservation in South Dakota. The matter before the court is a motion by the Tribe to dismiss the complaint in condemnation and the declaration of taking as to this tract on the grounds that Congress has not authorized the condemnation of tribal lands on the Standing Rock Reservation. Although the amount of land here involved is not large, the matter has considerable significance because the Oahe project will eventually require large acreages of tribal and allotted Indian lands. The pending motion has been argued orally to the court, and briefs have been submitted by counsel on both sides.

The land in question is part of a vast reservation set aside for the Sioux Nation by a treaty between the United States and the Sioux on April 29, 1868, 15 Stat. 635. By Article 2 of that treaty, the United States agreed that the reservation land was "set apart for the absolute and undisturbed use and occupation of the Indians". Under Article 11 of that treaty, the Tribe agreed to relinquish all right to permanently occupy land outside the reservation, and further agreed not to object to the construction of "railroads, wagonroads, mail-stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States". A proviso of Article 11 stated that, in the event such roads or other works were constructed on reservation land, the amount of damages would be assessed by three commissioners, one of whom was to be a chief of the Indians. Also pertinent to the rights of the Indians to the reservation land was Article 12, which stated:

> "No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same:".

By the subsequent treaties of 1877, 19 Stat. 254, and 1889, 25 Stat. 888, the original reservation was reduced and formed into separate reservations, one of which was the present Standing Rock Reservation. Both of these later treaties, by Article 8 of the 1877 treaty and by Section 19 of the 1889 treaty, kept the above-mentioned provisions of the 1868 treaty in force.

In addition to the provisions of the 1868 treaty, the following statute has importance in relation to the subject to alienation of Indian lands:

> "No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 USCA Sec. 177.

The question presented by this motion, therefore, is whether, in view of this legislation and the treaty provisions, considered in the light of the history of Congressional and judicial treatment of Indians, the Secretary of the Army has sufficient authorization from Congress to acquire this tribal land by condemnation.

Certain principles of law are not disputed by either the Tribe or the Government, but a recitation of these principles will assist in placing the issue here in its proper perspective. The right of eminent domain, which is the power to take private property for public use, is an inherent incident of sovereignty requiring no constitutional recognition, and the provision of the Fifth Amendment to the federal Constitution that just compensation be paid for property taken is merely a limitation upon the use of that right. *United States* v. *Jones*, 109 U.S. 513 (1883); *United States* v. *Federal Land Bank of St. Paul*, 8 Cir. 1942, 127 F2d, 505, 508. The right to authorize the exercise of eminent domain lies only in the Congress, and an agency or officer of the United States may take property only to the extent of the Congressional authorization. *United States* v. *North American Transportation and Trading Co.*, 253 U.S. 330 (1920); *United States* v. *Welch*, 327 U.S. 546 (1946); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). Congress has the power to authorize the taking of Indian tribal lands. *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641 (1890). Where there is a treaty with Indians which would otherwise restrict the Congress, Congress can abrogate the treaty in order to exercise its sovereign right. *Thomas* v. *Gay*, 169 U.S. 264 (1898); *Choate* v. *Trapp*, 224 U.S. 665 (1912).

It is obvious, then, that Congress has the authority to condemn the tract in this case, and this can be done even though it is in abrogation of the treaty provisions. But this is not to say that the treaty provisions are to be ignored, but instead it is to require that there be clear Congressional action which indicates an intention to abrogate the terms of the treaty. Manifestly, this must be so if the treaty is to have any meaning at all. By the very existence of the treaty, providing that the reservation land be set aside "for the absolute and undisturbed use and occupation of the Indians" and that there be no cession of the land except

with the consent of three-fourths of the adult male Indians, a special situation has been created which requires different treatment for this Indian land than for non-Indian land. Non-Indian land is not held by virtue of such a treaty, nor has it been acquired under the circumstances in which these treaties have been made. The minimum meaning of these treaty provisions, containing solemn promises to the Indian people by the government of the United States, is that they stand as the highest expressions of the law regarding Indian land until Congress states to the contrary.' The Indians are entitled to depend on the fulfilment [sic] of the terms of the treaty until the Congress clearly indicates otherwise by legislation. In any such enactment, Congress, as the guardian of the Indians, ordinarily makes ample provision for the interests of its wards. This places no unconscionable burden on the United States nor in any way impairs its sovereignty over the Indians, but merely requires a recognition of the special situation of the Indians. As will be pointed out herein, the Congress, over a long period of time, has acted constantly in accord with this requirement.

In its complaint and its declaration of taking, the Government cites five statutes to show the authority under which it is attempting to condemn this tract of tribal land. Since the established rule is that the party seeking to exercise the right of eminent domain has the burden of showing his authority, 1 Nichols on Eminent Domain, Sec. 3.213, and the existence of the 1868 treaty necessitates a Congressional intention to abrogate the applicable provisions of that treaty, the burden is on the Government in this case to show that one or more of these five statutes indicate a Congressional intention to abrogate the treaty provisions, thereby giving the Government the requisite authority to condemn the land.

The first statutes cited in the complaint are 33 USCA Sec. 591 and 33 USCA Sec. 701. Sec. 591 empowers the Secretary of the Army to acquire lands by condemnation for river and harbor projects "for which provision has been made by law." Sec. 701 extends this power to flood control projects. Unquestionably, the two statutes form the basis of the condemnation authority possessed by the Secretary of the Army in acquiring ordinary lands in the prosecution of such projects. However, by no stretch of the imagination

can it be said that Congress, in the enactment of these laws, had in mind the specific situation of the Standing Rock tribal lands, or even Indian lands in general.

The principal statute upon which the Government relies is the Flood Control Act of 1944, 58 Stat. 887. Sec. 9 (a) of this act gave general approval to the prosecution of designated plans for the development of the Missouri River Basin program. There is no mention of Indian lands in the act itself, but the Government calls attention to an excerpt from one of the Senate and House documents which contained the designated plans:

> "The proposed reservoirs will inundate Indian lands at several points. The estimates submitted on the over-all costs of the projects include funds to cover the cost of taking such lands and buildings, including relocation of burial grounds. It is to be understood, therefore, that approval of this plan includes authority for the Indians through their tribal councils, with the approval of the Secretary of the Interior, to convey and relinquish such property to the United States, and authority for the Secretary of War to enter into appropriate agreements with the Secretary of the Interior and the Indian tribes concerned for the payment of the fair value of the property taken, or for the contribution of a sum approximating such value toward locating or constructing or toward relocating or reconstructing buildings, works, facilities, or water projects in the vicinity of the Missouri River or its tributaries." Senate Document 247, 78th Congress, 2nd Session, page 4.

This portion of the Senate document was an excerpt from a letter sent by the Chief of Engineers to the Chairman of the Committee on Flood Control of the House of Representatives. While we agree with the Government that this letter plainly discloses that Congress was aware that Indian lands would be acquired in the proposed projects, this court cannot hold that such an awareness or knowledge on the part of Congress indicates an intention to authorize condemnation proceedings as the method of acquiring these Indian lands. To the contrary, this letter indicates that Congress recognized the special situation regarding the Indians, and desired that some mutually agreeable plan be worked out for the acquiring of these lands. This letter

contemplates no more than voluntary negotiations, with no implication of what proceedings might be taken in the event of the failure of such negotiations. As will be pointed out *infra*, Congress subsequently followed the thinking expressed in this letter by providing for specific voluntary negotiations to be made in relation to tribal lands on the Standing Rock Reservation and on other reservations. The Flood Control Act of 1944 cannot be the legislation necessary to authorize the taking of Indian tribal lands unless it could be held that a general law approving a series of particular projects can be applied to specific Indian lands which are bound by treaty. We believe such a holding to be untenable. General legislation is not sufficient to include Indian tribal lands.

The fourth statute cited in the complaint is the Public Works Appropriation Act of 1956, 70 Stat. 474, 480. This is no more than an appropriation act limited to "projects authorized by law", and adds nothing to the 1944 Flood Control Act insofar as authority to take Indian tribal lands is concerned.

The last statute, which is cited in the declaration of taking, is the Declaration of Taking Act, 40 USCA 258a. This law merely provides for the procedure in condemnation suits and does not authorize the taking of Indian tribal lands by condemnation.

Since all of the authorities relied upon by the Government are general statutes which do not refer to Indian lands, it is important to note that the Supreme Court has frequently held that general legislation does not apply to Indians. The rule is well stated in *Elk* v. *Wilkins*, 112 U.S. 94 (1884), where an Indian's claim to United States citizenship on the basis of being a "person born . . . in the United States" within the meaning of the Fourteenth Amendment was rejected in the following language:

> "The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through acts of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance

> to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any state. *General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.* (italics added) 112 U.S. at pp. 99, 100.

In addition to the numerous authorities which are cited therein to support this statement of the law, see the following decisions subsequent to the Elk case: *United States* v. *Rickert*, 188 U.S. 432 (1903); *Choate* v. *Trapp*, 224 U.S. 665 (1912); *Squire* v. *Capoeman*, 351 U.S. 1 (1956); *Lewellyn* v. *Colonial Trust Co.*, 3 Cir. 1927, 17 F2d 36; *McCandless* v. *United States*, 3 Cir. 1928, 25 F2d 71; *Chouteau* v. *Commissioner of Internal Revenue*, 10 Cir. 1930, 38 F2d 976; 340 Op. A.G. 439, 444 (1925). These authorities clearly point out that, because of the peculiar situation of the Indians which has resulted in a guardian-ward relationship with our country, Congress, in the enactment of legislation, is obliged to indicate when such legislation is intended to be applied to Indians and their property.

That Indians are the subject of special legislation is particularly evident from the existence and content of Title 25, Indians, of the United States Code. Contained therein is a myriad of laws pertaining to the protection and education of Indians, agreements with Indians, and the performance by the United States of obligations thereunder, Indian agencies, and six chapters of laws having as their principal subject, Indian lands.

Although we have occasionally used the term "Indian lands", the case at bar involves only "Indian tribal lands" as distinguished from "Indian allotted lands". Of signal importance, then, is the fact that Congress has seen fit to specifically provide by statute that lands allotted in severalty to Indians could be condemned for public purposes. Act of March 3, 1901, 31 Stat. 1084, 25 USCA Sec. 357. But the passage of this act only serves to emphasize that no comparable authority to condemn "Indian tribal lands" has ever been given. The very existence of this act allowing condemnation of Indian allotted lands is

graphic evidence that Congress itself felt it necessary, because of the provisions of the various treaties and legislation prohibiting alienation of Indian lands, to clearly provide the right to condemn Indian allotted lands.

Even more significant is the following record of Congressional dealings with Indian tribal lands, many of these acts being in connection with the Missouri River Basin program:

(1) Act of August 19, 1937, c. 702, 50 Stat. 700, wherein the Secretary of the Interior is authorized to acquire tribal lands on the Shoshone Indian Reservation for the Wind River irrigation project in Wyoming, with the deposit of certain funds by the Government to operate as an extinguishment of all right, title and interest the Indians possess in the land;

(2) Act of July 8, 1940, c. 552, 54 Stat. 744, providing outright that all right, title and interest of the Indians in the tribal and allotted lands of the Fort Mohave Indian Reservation in Arizona and the Chemehuevi Reservation in California, as designated by the Secretary of the Interior, is granted to the United States for the Parker Dam and Reservoir project, with the Secretary of the Interior given the authority to determine the amount of compensation;

(3) Act of May 2, 1946, c. 247, 60 Stat. 160, 167, which prohibited expenditures of appropriations for the Garrison Dam and Reservoir project, a part of the Missouri River Basin program, until the Secretary of War, through the Secretary of the Interior, had selected and offered to the Three Affiliated Tribes of the Fort Berthhold Reservation, land comparable in quality and sufficient in area to compensate the tribes for lands on the reservation which would be flooded;

(4) Joint Resolution of October 29, 1949, c. 790, 63 Stat. 1026, providing for negotiations by Government officers with the Three Affiliated Tribes of the Fort Berthhold Reservation for payments for allotted and tribal lands to be taken, and further providing that, upon the rejection of the Government appraisal, the Department of the Army shall institute condemnation proceedings;

(5) Act of July 18, 1952, c. 946, 66 Stat. 780, wherein the Secretary of the Interior, for a reasonable consideration not to exceed a certain amount, is authorized to convey to the United States property and rights of the Shoshone and

Arapaho Indian Tribes needed by the United States for the Boysen Unit of the Missouri River Basin program;

(6) Act of September 3, 1954, c. 1260, 68 Stat. 1191, providing for the ratification by Congress and by three-fourths of the adult Indians of the Cheyenne River Indian Reservation of a certain agreement for payment of compensation for tribal and allotted lands required to be taken for the Oahe Dam and Reservoir project and for payment for the costs of relocation of the members of the Tribe and their property, and that upon such ratification the agreement acts as a conveyance of the lands to the United States;

(7) Act of August 3, 1956, c. 931, 70 Stat. 987, authorizing the Shoshone and Arapaho Tribes of the Wind River Reservation to convey their interest in certain tribal lands to the United States for a sum mutually agreeable to the Tribes and the Secretary of the Interior, with the provision that in the event of a failure to agree on a price, the Secretary shall report the same to Congress and, thirty days afterwards, proceed to acquire the land by eminent domain.

The above list of enactments is not meant to be exhaustive, but does fairly represent the legislative pattern of dealing individually with Indian lands where the same are required for public projects. It is particularly significant that in several of the acts, the Congress has specifically provided for the institution of condemnation proceedings in the event of the failure of voluntary negotiations.

Of particular importance in this case is the Act of September 30, 1950, c. 1120, 64 Stat. 1093, which authorized and directed the Chief of Engineers and the Secretary of the Interior to "negotiate contracts" with the Sioux Indians of the Standing Rock and Cheyenne River Reservations for the conveyance of the Indians' interests in tribal and allotted lands required for the Oahe project and for the payment of just compensation for the land to be taken together with payment of the costs of relocating and re-establishing the tribes and their individual members. The act further provided that any such contracts negotiated should be submitted to Congress within eighteen months (extended to twenty-eight months by Act of April 8, 1952, c. 165, 66 Stat. 46) after the date of enactment of the act, and that no contract would take effect until ratified by Congress and three-fourths of the adult male members of the two tribes; and

that in the event the parties are unable to agree on any item, such items are to be set forth separately in a report to Congress. This act, like the others mentioned above, is in line with the thinking expressed in the letter from the Chief of Engineers noted *supra*, and it stands as evidence that Congress contemplated only voluntary negotiations with the two tribes. This 1950 act merely established the machinery for entering into such negotiations. But singularly missing, insofar as any reliance on this act for an indication of Congressional intention to acquire these lands by condemnation, is any reference to what proceedings might be taken in the event of unsuccessful negotiations. An agreement was completed with the Cheyenne Tribe which culminated in the Act of September 3, 1954, c. 1260, 68 Stat. 1191. Counsel for the Government has informed the court that negotiations with the Standing Rock Tribe were unsuccessful, but this court has been able to find no indication that Congress was ever notified of such result in accordance with the directions of the act. Certainly Congress, which took the effort to enact special legislation providing for these negotiations, should be informed of the results of the 1950 enactment, as amended in 1952, and of the present state of affairs.

The Government places some importance on the last sentence of the 1950 act which states that nothing in the act shall be construed to restrict or delay the Oahe project. This reveals little more than an intention to continue with the Oahe project during these negotiations.

In considering whether the Government has sufficiently upheld its burden of showing a Congressional intention to abrogate the 1868 treaty provisions, two other principles of law should be kept in mind. In the first instance, any statute allegedly authorizing eminent domain is to be strictly construed against the taking party. *Delaware, Lackawanna & W. RR. Co.* v. *Morristown*, 276 U.S. 182 (1928); *United States* v. *A Certain Tract of Land*, C.C. E.D. Penn. 1894, 70 Fed. 940; *United States* v. *West Virginia Power Co.*, D.C.S.D. W. Va. 1940, 33 F. Supp. 756. *A fortiori*, where the taking party is the guardian and the party subject to the power of eminent domain is the ward, this principle would have all the more application. This leads to the second principle, that statutes concerning the rights of Indians are to be

liberally construed in their favor. *Choate* v. *Trapp*, 224 U.S. 665 (1912); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918). The Supreme Court in the Choate case said:

> "But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases." 224 U.S. at p. 675.

When the issue in the instant case is considered in the light of the above principles, there is little doubt of what this court's decision must be.

The Government has not taken any very tangible or consistent position in its opposition to the Tribe's motion to dismiss. However, because of the importance of the case, we feel that we should mention each of the Government's arguments, namely: (1) that the 1868 treaty, by Article 11, included the consent of the Tribe to land acquisitions such as the instant one; (2) that Indian lands are subject to the right of eminent domain the same as other lands; (3) that it is not meritorious to object to the lack of specific authority to take tribal lands; (4) that any requirement in regard to the taking of Indian lands has been met by the letter from the Chief of Engineers and similar memoranda which prove that Congress, in authorizing the Missouri River Basin program, was aware Indian lands would be flooded and would have to be acquired; (5) that the Government is not estopped in its dealings with the Standing Rock Tribe because of its prior dealings with other Indian tribes, nor is it estopped by the act of 1950; (6) that *Henkel* v. *United States*, 237 U.S. 43 (1915); *United States* v. *5,677 Acres of Land*, D.C. Mont. 1957, 152 F. Supp. 861; *United States* v. *21,250 Acres of Land*, Civil No. 7279, W.D. N.Y. January 11, 1957 (unreported), all support the Government's opposition to this motion; (7) that to hold for the Tribe here would be to require the Government to proceed in an illegal manner as a trespasser.

As to the first argument, it is unreasonable and contrary to the rule of *ejusdem generis* to include the huge takings of reservation land which the Oahe project will require, within the context of the provision of Article 11 of the 1868 treaty concerning "other works of utility or necessity." Further, if the present acquisition were so included within the meaning of the treaty, the Government is not proceeding to determine compensation in the manner provided therein.

Arguments (2) and (7) meet no disputable point and have no bearing on the issue for determination here.

Arguments (3) and (4) have been sufficiently met by the Tribe, and have been previously discussed in this opinion.

Argument (5) is based on a misconception of the Tribe's position in this case. The Tribe does not contend that the Government is estopped by its past conduct, but only that such past conduct is important in considering the question here before the court.

None of the cases cited under argument (6), although having some similarity, involve the precise point here presented. The Henkel case involved allotted land and arose in a completely different factual situation which included a treaty with the Blackfeet Indians that specifically reserved to the Government the right to use the lands for certain public improvements. The Montana case was presented mainly on the issue of the power of the United States to condemn in the face of particular statutes which the Indians contended specifically forbade such condemnation. We are informed by counsel for the Standing Rock Tribe that the Montana court, acting through a different judge, has recently called for further briefs from both sides in that case, indicating a review of the decision therein. The New York case involved the denial of a motion to vacate an order of taking giving the Government officers the right to survey Indian tribal lands. Although one of the grounds for the motion was the lack of authority to condemn the land, the court's opinion shows that the matter was considered in the light of treaty provisions and legislation different from that in the case at bar. Further, the court's decision on that ground rests mainly on the Cherokee Nation case, *supra*, which stated no more than the proposition that Congress can authorize the condemnation of Indian tribal lands, a principle which is not questioned here. Subsequent to its

decision on the motion to vacate, the same court, in denying a Government motion to strike the affirmative defense of lack of authority to condemn from the answer, said of its prior decision:

> "We do not regard that decision as of sufficient authority to strike otherwise unobjectionable portions of defendant's affirmative defense in view of the stringent requirements placed on defendant by F.R.C.P. 71 (e)." United States v. 21,250 Acres of Land, Civil No. 7279, W.D. N.Y., June 11, 1957 (unreported).

Counsel for the Standing Rock Tribe has informed us that thereafter, the Seneca Nation, which was the Tribe of Indians involved in the New York case, brought suit in the District of Columbia to enjoin the Government officers from going forward with the project contemplated, and the United States District Court for the District of Columbia overruled a motion to dismiss the complaint. *Seneca Nation* v. *Brucker*, Civil No. 2202-57, D.C. D. of C., December 17, 1957 (unreported). The current status of the cases in both New York and the District of Columbia present no controlling authority upon which this court can rely.

For all the foregoing reasons it is clear to this court that Congress has never provided the requisite authority to the Secretary of the Army to condemn this tribal land. The Government admits that the five statutes relied upon do not specifically authorize such condemnation, and the contentio that these general enactments can be used by the United States, which is the guardian, to take the lands of the Indians, who are its wards, is wholly repugnant to the entire history of Congressional and judicial treatment of the Indians, and, further, is a view which is quite unacceptable to this court.

In order to emphasize the issue in this decision, we wish to restate that the authority of Congress to exercise the right of eminent domain over Indian tribal lands is not questioned. We are granting the motion of the Tribe because of a lack of exercise of this authority. The matter can be speedily remedied by bringing it to the attention of the Congress.

The defendant Tribe's motion to dismiss will be granted. Defendant Tribe's counsel may prepare and submit a form

of judgment dismissing the complaint and the declaration of taking, as to Tract R-1825.

Done and entered at Sioux Falls, South Dakota, this 10th day of March, 1958.

BY THE COURT
GEORGE T. MICKELSON, *District Judge*